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IN THE

Supreme Court of the United States

October Term, 1963

No. 285

In the Matter of Proceedings Pursuant to Section 9-a (amended to Section 22) of Article VI of the Constitution

In Relation to

LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

against

COURT ON THE JUDICIARY OF THE STATE OF NEW YORK, by JOHN R. DAVISON, ESQ. and WILLIAM R. BRENNAN, ESQ., Counsel Designated by Said Court to Conduct the Proceedings,

Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

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In Relation to

LOUIS L. FRIEDMAN, Justice of the Supreme Court, Second Judicial District,

Appellant,

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Appellee.

ON APPEAL FROM COURT ON THE JUDICIARY
OF THE STATE OF NEW YORK

APPELLANT'S BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

Statement

Appellee's brief in support of its motion to dismiss or affirm does not meet any of the issues or answer the questions presented to this Court in the Jurisdictional Statement heretofore filed.

Instead, its submission includes approximately 39 pages of *distorted factual material* with much of it taken out of

context, and incorrect citations of law. If appellant answered each of those incorrect factual presentations, it would unduly lengthen this brief and serve no useful purpose, since the facts are only necessary insofar as they affect the questions presented. Nevertheless, a few illustrations appear appropos, and they will be set forth herein.

Additionally, many of appellee's citations between pages 39 and 62 of its brief are likewise inaccurate, in that they are either not in point, or do not support the statement of law for which they are cited. In at least one instance (*Allen* v. *Georgia*, 166 U. S. 138 pp. 41-42, Appellee's Brief), the quotation submitted is not included in the citation given.

Aggravating this type of submission, are designated counsel's unfounded several statements in their brief, that the undersigned's (1) "citation of and quotation from *The Queen* v. *The London County Council*, 1 Q. B. 190, exceeds the bounds of ethical advocacy"; that it "is insulting in that it intentionally impugns without any justification the honesty and integrity of the Court on the Judiciary and that of counsel designated to conduct the proceedings." (p. 50, Appellee's Brief); (2) that appellant's counsel show "unethical intent" in citing that case (p. 50, Appellee's Brief); (3) that the argument as to the improper composition of the Court on the Judiciary "is silly" (p. 54, Appellee's Brief); and (4) that appellant's Point IV of the Jurisdictional Statement is "fraudulent" (p. 60, Point VI Appellee's Brief). Nothing in either the record or appellant's Jurisdictional Statement justify such irresponsible charges against appellant's counsel.

Some of Appellee's Factual Distortions

At page 7 of appellee's brief is the statement that "for the year 1955," appellant's former partnership "reported their *taxable* partnership income was $269,923 (R. pp. 1243a, 1247a-1249a)." A reference to the record referred to shows

that the said sum was *gross income* of the firm and not *taxable income*. Incidentally, the charge against appellant of income tax violation had no basis in fact and was not sustained.

At two places (pp. 7-8 appellee's brief), and in their discussion of the *Shevack* case (pp. 33-39 appellee's brief), designated counsel attempt the innuendo that appellant practiced law while on the bench. Although evidence with respect to such a charge was admitted over appellant's objection that no such charge was ever therefore made, and that receiving evidence relating thereto was in effect adding another charge, the Court on the Judiciary never made any such finding against appellant, and it is grossly unfair and improper for designated counsel now again to make the same contention in their brief.

The statements on pages 8-9 of appellee's brief impute a sinister motive to appellant because, with his brother's consent, he took all the financial records with him when he was appointed to the bench (October, 1955). As in most large law firms, only one of the partners (appellant) supervised the firm's financial records (R. Vol. II, 652a, 659a). The brothers were both bachelors until 1953 (R. Vol. IV, 1282a), and all of their investments were jointly owned, and all supervised by appellant (R. Vol. II, 673a, 735a). His appointment to the bench (on but two days notice) (R. Vol. IV, 1319a-1320a) necessitated a liquidation of the firm, and so the partner who knew about the financial records, took them with him by consent, to supervise the liquidation, which ended in Dec. 1962 (R. Vol. IV, 1248a). A gradual liquidation was the proper procedure under the Internal Revenue Code (Sec. 736, Int. Rev. Code; April, 1960, N. Y. State Bar Assn. Bulletin, p. 115 *et seq.*).

Since the same accountant worked at the same time on both the liquidation books and the individual books of the remaining partner, it seemed perfectly proper that this be done in chambers. Appellant was still responsible for

filing income tax reports as to the liquidation and paying the tax therupon. It seems incredible that such an innocent act could be charged and found against appellant as an abuse of his public office as a Justice of the Supreme Court. Assuming even that later events showed that it would have been wiser to leave the financial records at the law office and go back there from time to time to consult with the accountant, "A wisdom developed after an event and having it and its consequences as a source is a standard no man should be judged by." *Costello* v. *Costello*, 209 N. Y. 262.

As the only one who knew anything about the financial affairs of the two brothers, appellant had to either go to that law office or have the work done in his chambers. Appellant selected chambers, where he attended every day, as the more convenient place.

The statement in appellee's brief (p. 14) "that appellant was aware because he was told why it was not feasible to examine the books in his Supreme Court Chambers" is incorrect. Nothing in the record shows that any information with respect thereto was ever given to appellant. Notwithstanding the many pages devoted to the details of the proceedings which took place, appellee's brief now concedes that appellant was willing to "make arrangements so that they could see it (the books and records) in private" (p. 9, Appellee's Brief); that appellant's brother "asked that they be inspected in * * * Chambers" (p. 10, Appellee's Brief); that Mr. Hurley conceded that appellant said that he would "permit an examination of them in his chambers" (p. 11, Appellee's Brief); and that "Colonel Dykman * * * offered to make a room in his office available for the inspection of the records by the accountants for the Judicial Inquiry", p. 13, Appellee's Brief). In addition, the statement by the then presiding Justice Gerald Nolan, which is set forth in full on pages 7 and 8 of the Jurisdictional Statement, clearly illustrates that appellant at-

tempted to find some method, even before any subpoena was ever served upon him, to have the books inspected in private.

The statement at page 24 of appellee's brief to the effect that Justice Baker (who was later in charge of the Inquiry) ruled that "A Supreme Court Justice has no constitutional or statutory immunity from being subpoenaed as a mere witness * * *" is taken completely out of context. This ruling *upheld appellant's contention* that there was no authority for an investigation of the Justices of the Supreme Court in their judicial capacity, and that any interrogation of appellant could only be as a witness. The Jurisdictional Statement (pp. 10-11) shows the attempts to investigate appellant's judicial conduct without any authority to do so. Appellant's objection was that he was being singled out amongst all of the many Justices in Kings County, without any authority in the Judicial Inquiry to conduct such an investigation under the order of its appointment. Being so singled out created an unfair impression about appellant in the minds of the public.

At page 27 of its brief, appellee states that "appellant caused his brother to violate the Canons of Professional Ethics for which his brother is now being disciplined." Such a charge was made against appellant *but no such finding was made* (see Appendix A, p. 33, Jurisdictional statement).

At page 39 of its brief, appellee states that appellant caused "his brother, Malcolm, to be found guilty and disciplined for failure to report income." No such finding was made by the Court on the Judiciary. As a matter of fact, the only amount of unreported income which was ever shown for the three year period involved was $88.88, and it is unfortunate that such a minimal amount, conceded by appellant's brother as having been unreported through error by the accountant, should have been the basis for discipline, particularly since the Federal Government, after investigation, did not see fit to institute criminal action or assess any fraud penalty with respect thereto. Research fails to

disclose any other case in New York State where a lawyer was disciplined for income tax violation without prior fraud or criminal proceedings by the government. The charges in this respect against appellant were dismissed by the Court on the Judiciary.

A final illustration of the many record distortions in appellee's brief (p. 32) is the statement that a finding was made that appellant's testimony was "incredible" with respect to the 1953-1954 records which had been disposed of about a year before the inquiry started.

No such evidence appears in this record and no such finding was ever made. The record shows that about eight months after appellant's appointment to the bench, he cleaned out about 6,000 closed legal and financial files dating back to 1928 (R. Vol. IV, p. 1288a). Included were all files containing financial records through 1954 which had already been audited by the Income Tax Bureau.

Designated Counsel's method of handling facts has been illustrated. They used the same methods against appellant in the court below, and perfectly innocent transactions become the basis for a claim that appellant abused his public office as a Justice of the Supreme Court, even though none of the matters involved were even remotely connected with any of the thousands of judicial matters over which he presided, and there was no charge of corruption, misfeasance or malfeasance in office.

Judges do not *abuse their public offices* by conduct unconnected with their official duties which fails to meet the approval of *everyone*. Even the manner of performance of their judicial duties does not always meet universal approval, and yet is certainly not grounds for removal. Here, there was disagreement amongst the very judges before whom appellant was tried as to the propriety or non-propriety of his behavior, two of the six judges present at the time of the final hearing voting to dismiss the charges.

Eighteen of appellant's colleagues on the Supreme Court bench in the second judicial district, who are in the best position to know of his work, have attested in the Court below to his "ability, character and integrity", and have, on the basis of their personal observation, characterized him as "a learned, conscientious and devoted judge" who "has performed his judicial functions with skill, experience and impartiality" (R. Vol. IV, pp. 1255a, 1259a; Exh. 4, attached thereto).

The late Justice Russell Benedict, in a paper read at the annual meeting of the New York State Bar Association on January 21, 1922, wrote about "the glorious example of Lord Coke, who forefeited the office of Chief Justice of England and spent seven months in the Tower because he protested against the aggressions of James the First which debased and corrupted the administration of the law."

The gravamen of the charges against Lord Coke was that he "showed indecent behavior before his Majesty, the Lords of Privy Council and Judges, taking exception to the King's Attorney (Bacon) in his Majesty's presence." See Catherine Drinker Bowen's recent (1957) learned biography of Coke ("The Lion and the Throne"), pp. 377-378, the author concluding:

> "Weaker charges had never been brought against a judge."

The same may be said of the charges in the proceeding below. It is the failure to accord to appellant the most fundamental rights of due process which gives this Court jurisdiction. Justice Benedict wrote of judges in the same papers (*supra*):

> "He does not cease to be a citizen by becoming a judge."

As we shall show under the several points below, the cases submitted by Appellee are not in point and are inaccurately set forth.

POINT I

Appellant had a property right in his office and the emoluments therefrom and has been deprived thereof without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

Under Point I of its brief (p. 39) appellee states that "Appellant had no constitutional right to his office." and cites *Wilson* v. *State of North Carolina*, 169 U. S. 586, *Allen* v. *Georgia*, 166 U. S. 138, and *Snowden* v. *Hughes*, 321 U. S. 1. None of these cases are in point.

Wilson v. *North Carolina, supra* (1897), involved a railroad commissioner who was *suspended* from his office by the Governor, when charges were preferred against him. In its opinion this Court wrote that:

> "Under the statute of 1891, creating the Railroad Commission and providing for the appointment, suspension and removal of the officers of said commission, the act of the Governor in suspending the plaintiff in error *was not a finality.* Before there could be any removal, the fact of suspension was to be reported to the next legislature by the Governor, and unless that body removed the officer, the effect was to reinstate him in office, and he then became entitled to the salary during the time of his suspension." (Emphasis supplied.)

Since Wilson had not been deprived of any property by reason of his *suspension*, no federal question was presented and the Supreme Court so held.

In *Allen* v. *Georgia*, 166 U. S. 138 (1897), *supra*, the appellant had been convicted of murder. His writ of error had been dismissed by the Supreme Court of the State of Georgia because at the time "he had escaped from jail and was a fugitive from justice * * *" (p. 139). He claimed that such dismissal was a denial of due process. This Court affirmed, holding that since Allen was not in custody, the question was moot and the Court would not "determine moot questions" (p. 140); that "By escaping from legal custody he has, by the laws of most, if not all, of the States, committed a distinct criminal offence; and it seems but a light punishment for such offence to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction." (p. 141); that he was not in custody; and that "To justify any interference upon our part, it is necessary to show that the course pursued has deprived, or will deprive the plaintiff in error of his life, liberty or property without due process of law" (p. 140).

The *Allen* case is cited as authority for the statement in appellee's brief (p. 39) that "Appellant had no constitutional right to his office." There seems to be no relationship between the *Allen* case and this statement. In addition, appellee's brief (bottom of p. 41 and top of p. 42) puports to quote from that case, even though the quotation set forth does not appear anywhere in the *Allen* opinion.

Snowden v. *Hughes*, 321 U. S. 1 (1943), *supra*, is likewise distinguishable. There the petitioner sued three members of the State Primary Canvassing Board of Illinois for damages for infringement of his civil rights because they had deprived him of his right *to run* for political office. He did not *hold* political office, but only *desired to be a candidate*. Since he had never been elected to office, the District Court dismissed the complaint on the ground that there had been no deprivation of property rights, and in addition because the claimed failure of the State officers to perform their duties "was not state action". As to this last con-

tention, the present rule seems to be otherwise. *Wright* v. *State of Georgia*, 83 Sup. Ct. 1240.

In addition, the principle enunciated in both the *Wilson* v. *North Carolina* and *Snowden* v. *Hughes* cases, *supra*, has recently been rejected by the majority of this Court in *Baker* v. *Carr*, 369 U. S. 186.

The cases cited in the Jurisdictional Statement (p. 15), *Torcaso* v. *Watkins*, 367 U. S. 488, *Slochower* v. *Board of Education*, 350 U. S. 551, and *Wieman* v. *Updegraff*, 344 U. S. 183, are authority for the principle that public office and its emoluments, are entitled to the protection of due process. The highest court of New York has held that a driving license "is of tremendous value to the individual and may not be taken away except by due process." *Matter of Wignall* v. *Fletcher*, 303 N. Y. 435, 441; *Hecht* v. *Monaghan*, 307 N. Y. 461. If a license to drive an automobile is property which enjoys the protection of due process, how much more so is a term of office as a Supreme Court Justice which still has almost eight years to go, and from which appellant would have derived a total salary of approximately $276,000.

Appellee's Point I is without merit.

POINT II

Article VI, Section 9a (now Section 22) of the New York State Constitution violates the due process requirements of the Fourteenth Amendment on its face and as applied to this appellant.

Under its Point II, appellee contends that the procedure outlined in the instant section of the New York State Constitution "is due process of law and appellant has had it." In support of this statement, appellee cites two cases, *Randall* v. *Brigham*, 7 Wall. 523, and *Ex Parte Wall*, 107 U. S.

265 (1882) (p. 43, Appellee's Brief). Aside from the fact that the quotation from *Ex Parte Wall*, 107 U. S. 265, is erroneously set forth at pages 43-44 of appellee's brief, through the omission therefrom of part of the first paragraph as well as two paragraphs between the first and second, its principle can no longer be deemed controlling under modern day concepts of what constitutes due process.

In addition, neither of the two cases is in point. Both of them involved disciplinary proceedings against attorneys, and it is now firmly established that attorneys in such proceedings, as well as applicants for admission to the bar, are entitled to the protection of due process. *Matter of Cohen*, 9 A. D. 2d 436, aff'd 7 N. Y. 2d 488, aff'd 366 U. S. 117; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232; *Matter of Willner*, 83 Sup. Ct. 1175. That being so, then surely the fixed term of office of a Justice of the Supreme Court, with its emoluments, is also entitled to equal protection.

The record in this case irrefutably shows that the Court on the Judiciary acted as the investigating body; then appointed and directed its designated counsel to prefer and prosecute the charges, which was done; and thereafter tried the charges which it had determined should be brought and which it directed its designated counsel to prefer. The record shows the following.

On August 15, 1962, the Court on the Judiciary* took the following steps with respect to the charges brought against appellant:

1. It passed "preliminarily on the sufficiency of the facts brought to its attention for the purpose of determining

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* We assume for the purpose of this argument only, that the Court was properly composed and organized on Aug. 15, 1962. We have already shown that it was not (pp. 24-26 of Jurisdictional Statement).

whether cause exists for the preferral of charges" (p. 43, Appellee's Brief).

See also: (a.) Statement of Charges, Appendix G, annexed to Jurisdictional Statement, p. 52, where it is stated that "the Court on the Judiciary has * * * determined preliminarily that sufficient cause exists for the preferral of charges * * *."

(b.) Paragraph numbered (6) of letter of Chief Judge Desmond to certain State officials wherein it is stated that "the Court on the Judiciary * * * has determined preliminarily that sufficient cause exists for the preferral of charges." (R.—motion to vacate, letter annexed).

(c.) Press release of Court on the Judiciary (annexed to same motion to vacate) wherein it is stated that "Chief Judge Desmond convened the Court on August 15, 1962, and *the six-judge body determined preliminarily that sufficient facts were disclosed as to the conduct of Justice Friedman for the preferral of charges for removal from office.*" (Emphasis supplied.)

(d.) Page 46 of Appellee's Brief (top of page) where it is stated *that the power in a court on the judiciary to consider charges of removal carries with it an "implied power" to conduct a preliminary inquisition as to whether such charges should be made*, and that such "power to determine preliminarily whether there is a *basis* for a charge being preferred is for the protection of the person involved and not for the purpose of prejudging him." (Emphasis supplied).

(e.) Page 58 of appellee's brief where it is stated: "And four here decide that there was a *basis* for charges being preferred against appellant." (Emphasis supplied.)

2. It then designated counsel to prefer the charges, which they did.

The jurisdictional statement (pp. 30-31) quotes from the affidavit of John R. Davison dated July 11,

> 1963, in which he states that "* * * deponent and Mr. Brennan were the parties *designated by the court on the Judiciary to prefer the charges* * * *" (Emphasis supplied.)

3. The Court also made an order designating the same counsel who had already been appointed to prefer the charges, to prosecute them (see order designating counsel attached to same motion to vacate).

The Court on the Judiciary violated due process when it thereafter tried the very charges which it determined should be brought and which it directed its designated counsel to prefer and prosecute. *Matter of Murchison*, 349 U. S. 133, already cited in our Jurisdictional Statement (pp. 16, 21) is directly in point and there is no escape from the rule therein laid down.

Contrary to the statement in appellee's brief (p. 50), no attack on the personal integrity of the members of the Court on the Judiciary is intended or made through the submission to this court of the citation of *The Queen* v. *The London County Council*, 1 Q. B. 190, (p. 17, jurisdictional statement). Appellant does say that the court below erred and violated the principles of due process, partially by reason of the unconstitutional features of the state constitutional section under which it presumed to act, and which imposed upon the court the duty of investigation, the preferral of charges, the prosecution, and the ultimate final proceedure of trial and determination.

While, contrary to what happened in *The Queen* v. *The London County Council, supra,* designated counsel here are not paid for their services by the court below but by the State, their right to any compensation depends in the first instance upon the institution of a proceeding, and in the second instance upon being designated by the court to prosecute the charges which they made. The amount of

their compensation is, under the law, fixed by the Presiding Judge. (See Jurisdictional Statement, p. 15)

It is not the mere assignment of counsel which is here involved. It was the Court's preliminary investigation and direction to said counsel to prefer and prosecute the charges which were later to be tried before said Court, which here violated due process.

In Schlesinger Appeal, 404 Pa. 584, and *Amos Treat & Co.* v. *S. E. C.*, 306 F. 2d 260, cited in the Jurisdictional Statement (pp. 18-19), leave no doubt that the requirements of due process were violated in the instant proceeding.

Appellee attempts to distinguish the *Amos Treat* case, *supra* (p. 51, Appellee's Brief) by stating that the Court's decision in that case was based upon a violation of an exclusionary sentence contained in 5 U. S. C., section 1004c. That is not so. The opinion in the *Amos Treat* case distinctly shows that the Court's decision was based "solely on due process grounds", 306 F. 2d at page 267, in " • • • that the investigative as well as the prosecuting arm of the agency must be kept separate from the decisional function."

The record does not support the statements in appellee's brief (pp. 6-7) that the Court on the Judiciary "thrice decided" "as a matter of fact" that it did not act as preferrer, prosecutor and trier of the charges. The Court on the Judiciary *never* decided this proposition as a matter of fact. There was no factual question involved at all. The issue presented only a question of law, and as such, it makes no difference whether the court erred once, or three times. *Baldwin* v. *Travelmen's Ass'n*, 283 U. S. 522; *Vander* v. *Casperson*, 12 N. Y. 2d 56; *O'Donoghue* v. *Boise*, 159 N. Y. 87. Strange as it may seem, not a single word of explanation by way of opinion or memorandum came from the Court on the Judiciary on any of the three occasions when it rendered its decisions. Appellee's brief (pp. 6-7)

makes its unfounded assertions upon mere inference and nothing more.

Appellee asserts (pp. 45, 46, 47, appellee's brief) that the Court on the Judiciary on August 15, 1962, only determined preliminarily that the complaint *on its face* stated facts sufficient to constitute a cause for the preferral of charges. The record shows otherwise, as has already been illustrated (pp. 11-12 this brief). If the Court only passed on the sufficiency of the complaint on its face, it would be deciding a question of law. But when it made an inquiry into the *facts* and determined on those facts that there was sufficient basis to prefer charges, and then appointed counsel and directed them to prefer and prosecute the charges, it was not deciding only a question of law. Rule V, adopted by the Court, only authorized it to determine whether the complaint *on its face* was sufficient. But the Court went beyond the authority of its own rule in inquiring into and then making the initial preliminary determination *on the facts.*

Matter of Richardson, 247 N. Y. 401, 413, cited by appellee at page 46 of its brief, is not authority for the statement there made, but does hold, as set forth in the Jurisdictional Statement (p. 21), that

> "* * * A preliminary investigation * * * is not a hearing by a judge. It is a search by an inquisitor."

Nor is *Matter of Judicial Inquiry*, 6 A. D. 2d 723 (p. 48, Appellee's Brief) authority for the statement that "the Appellate Division rejected the argument that the Justice conducting the Judicial Inquiry would be in such a case both accuser and Judge." The Justice in charge of the Judicial Inquiry merely heard *ex parte evidence and reported that evidence to the Appellate Division.* He did not *try* the proceedings or make decisions on the merits. It was on that basis that the Appellate Division made its ruling.

People ex rel. Karlin v. *Culkin*, 248 N. Y. 465 (app. br., p. 46) is distinguishable on the same basis.

Appellee's brief also asserts that "The State Constitution does not mandate that [the Court on the Judiciary] prefer such charges." and that proceedings under the constitutional article "are not in the nature of impeachment or punitive" (pp. 48-49, Appellee's Brief). The State Constitution gives the Court the power to "make its own rules * * * for the investigation * * *" (Sec. 9a, (6)(c); Sec. 22, f.) For what purpose are the rules "for investigation" other than to determine if charges should be brought, and if so, to bring them as they did here by designating counsel to do so.

And as to the contention that a removal proceeding of an elected judge is not one which is "in the nature of impeachment or punitive" (pp. 48-49, appellee's brief), the authorities hold otherwise. The very same Court on the Judiciary, in the only prior proceeding brought before it, *Matter of Sobel-Leibowitz*, 8 N. Y. 2d, pages "h", "j", following page 1158, said: (July 8, 1960)

> "Removal of any public officer, especially one elected by the voters, *is an extreme penalty*" (emphasis supplied).

The word "penalty" indicates that a proceeding which results therein is in the nature of a penal proceeding. Such a removal proceeding is "an impeachment of a judicial officer", *Matter of Tighe*, 97 App. Div. 28 (N. Y.), and in view of its "quasi-penal * * * character" "should be strictly construed" and require "clear and convincing evidence." *McMillen* v. *Drehl*, 128 Ohio St. 212, 190 N. E. 567.

Sausbier v. *Wheeler*, 252 App. Div. 267 (N. Y.) holds that "the law relating to removal from office is drastic and *highly penal*, and must be given a strict construction." (Emphasis supplied.) Similarly, *People ex rel. Robin* v. *Hayes*, 82 Misc. 165, 172, affd. 163 App. Div. 725, appeal

dismissed 212 N. Y. 603, holds that impeachment "is a method of procedure in a criminal case against a high official" for the purpose of removing him from office.

In *Randall* v. *Brigham*, 74 U. S. 523 (cited by appellee at page 43 of its brief as 7 Wallace 523), which involved a civil action against a Judge arising out of a disciplinary proceeding against an attorney, this Court, referring to judges, said: "* * * if faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account *by impeachment*, and removal from office * * *" (Emphasis supplied.)

Contrary to the assertion made by appellee at page 49 of its brief, the removal proceeding was an impeachment proceeding and punitive in nature.

Very few jurisdictions permit an original conviction to take place by a divided vote. (In New York City, the Court of Special Sessions may convict by a vote of 2 to 1 for misdemeanor only.) While closely divided votes are not unusual in *Appellate Courts*, they are exceedingly rare in the United States in courts of original jurisdiction. In this case, where the conviction and resulting removal of appellant was by a closely divided vote with a majority of but one, and without an opinion showing the basis for the formal findings and conclusions which were made, it illustrates graphically the wisdom of the rule of law that a court which has made a preliminary determination that charges should be preferred and has designated the persons who are to do so and who are to prosecute them, should not thereafter also try the case.

On its face, and certainly as applied to this appellant, the procedure mandated by Article VI, section 9-a, of the New York State Constitution violated the requirements of due process.

POINT III

Where clearly apparent, this Court may consider due process violations not previously raised, together with others theretofore raised and rejected by the Court below.

A.

Appellant concedes that he has never previously raised the question submitted in Point II of the Jurisdictional Statement with respect to the vagueness of the constitutional provision which authorized removal "for cause". Nevertheless, this Court, where a constitutional violation is plainly apparent, may still consider such question, *Terminiello* v. *City of Chicago*, 337 U. S. 1; *Wright* v. *State of Georgia*, 83 Sup. Ct. 1240.

"Cause", as construed by the latest New York State Court of Appeals case on this subject, *Matter of Droege*, 197 N. Y. 44, 51, (a much later case than Peo-ex rel. Munday, 72 N. Y. 445, cited by Appellee, (p. 53 of brief)) means whatever a court sitting on a particular occasion construes it to mean. A state constitutional provision, which prescribes such a drastic penalty as removal from high judicial office, for such a vague and indefinite reason as "cause", lacking as it does any standards to define the term, on its face violates the Federal Constitution. If, as this Court has held, a conviction for a breach of the peace "under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process", *Wright* v. *State of Georgia*, *supra*, how much more so is exaction of such a severe penalty as removal from high judicial office, for acts described in the removal section only as "cause".

Certainly, such a vague reason as "cause", "prevents judicial review" by failing to provide "the courts with some measure against which to judge the official action

that has been challenged." *Arizona* v. *California*, 83 Sup. Ct. 1468.

Cramp v. *Board of Public Instruction of Orange County*, 368 U. S. 278, and the cases cited therein, (cited in Jurisdictional statement, p. 23) is in point, even though appellee lightly casts its principle aside with the statement that it "has nothing to do with this case" (appellee's brief p. 53).

The instant section of the New York State Constitution violates on its face, due process for vagueness.

B.

For the first time since the proceedings were originally instituted against appellant before the Court on the Judiciary, it now appears from appellee's brief (p. 56) that there was a further violation of the principles of due process in that the Court on the Judiciary, in making its preliminary determination, *considered evidence which never later became a part of the record.* It is there stated that the Court on the Judiciary on August 15, 1962

> " * * * determined preliminarily that sufficient facts as to the conduct of Hon. Louis L. Friedman, Justice of the Supreme Court, Second Judicial District, were disclosed in the report of Mr. Justice Bernard S. Meyer in the proceeding 'In the matter of M. Malcolm Friedman, Attorney' for the preferral, by counsel designated to conduct the proceedings, of charges for Louis L. Friedman's removal from office for abuse thereof, * * * ".

Although *parts* of the evidence taken before Mr. Justice Meyer were later specifically described through stipulation and became part of the record herein, *no part of that Justice's report* was included in that record. The consideration and knowledge, nevertheless, by the Court on the Judiciary of said report, which is not a part of the record, manifestly violated due process. *Matter of Willner*, 83 Sup. Ct. 1175.

It thus appears, contrary to the assertion in appellee's brief (p. 46), that the members of the Court on the Judiciary *did* acquire "extraneous knowledge". To the extent that they acquired and used this "extraneous knowledge", not a part of the record, we do not concede "the open-mindedness of the members of the Court", as claimed by appellee (brief, p. 46).

Appellant has never heretofore raised this question because the record does not show, and he was not aware of what took place at the ex parte meeting held on August 15, 1962. Appellee's brief has now, for the first time, conceded that this extraneous evidence was considered by the Court on the Judiciary.

POINT IV

It is a violation of federal due process to deprive a person of property through action by a body which is required to be a court, but which has not been duly composed and organized as such

Under its Point V (p. 54, Appellee's Brief), appellee asserts that the manner in which state citizens are entitled to state offices or removed therefrom is not within the reach of federal due process, and that this Court has so decided. In support of that statement, appellee cites *Snowden* v. *Hughes, supra*, 321 U. S. 1; *Cave* v. *Newell, supra*, 246 U. S. 650; *Taylor & Marshall* v. *Beckham, supra*, 178 U. S. 548; *Wilson* v. *State of North Carolina, supra*, 169 U. S. 586; *Allen* v. *Georgia, Supra*, 166 U. S. 138.

None of the cases cited so hold. As we have previously pointed out, *Snowden* v. *Hughes, supra*, was a case which involved the question of whether state officers violated the principle of due process in ruling that appellant had no right to *run* for an office.

Wilson v. *State of North Carolina, supra,* involved only the principle that there was no deprivation of property because appellant there had only been *suspended* from office and until a final determination as to his removal was made, could not have lost any property rights.

Allen v. *Georgia, supra,* had nothing whatever to do with the question of State officers or removal proceedings, but involved the question of an escaped prisoner whose appeal was rendered "moot" by reason of that escape.

Cave v. *Newell, supra,* was dismissed for want of jurisdiction and did not involve the questions here presented.

Taylor & Marshall v. *Beckham, supra,* cited in the *Cave* v. *Newell* case, involved a contest over an election and the power of the state to prescribe the qualifications of its officers and the manner of their election. The statement at page 576 of the opinion (decided in 1899), "that public office is not property" has been overruled by the recent cases already cited herein. *Torcaso* v. *Watkins,* 367 U. S. 488, 495, 496; *Slochower* v. *Board of Education,* 350 U. S. 551, 555-557; *Wieman* v. *Updegraff,* 344 U. S. 183, 191-192, *supra,* p. 10.

The argument made by appellee under Point V of its brief (pp. 54, *et seq.*), that the Court on the Judiciary was duly composed and constituted, is not borne out by the conceded facts. The all-important session at which only four members were present, with only one instead of two from the Court of Appeals, was held on August 15, 1962 when the Court first attempted to organize. If those present could not legally organize as a court, then there was lack of judicial authority which "relates to basic constitutional protections designed in part for the benefit of litigants," *Glidden Company* v. *Zdanok,* 370 U. S. 530, 536, re-hearing denied, 371 U. S. 854.

The Appellate Division, Third Department, in the instant case has said, "Moreover, due process of law requires

that the court or other tribunal is competent and duly constituted" (Appendix D, Jurisdictional Statement, p. 41).

Important initial steps were taken on that date of August 15, 1962. Charges were voted, counsel was designated to prefer them and to prosecute them, a Clerk to the Court was appointed, rules were adopted, and other important procedures took place (see Clerk's Minutes under date of Aug. 15th attached to R., motion to vacate).

Appellee concedes (p. 56, Appellee's Brief) that two of the Judges (one of them from the Court of Appeals) were not present on August 15, 1962 and that the preliminary determinations "were made upon the vote, therefore, of all four of the members present." Appellee argues, however, that the Constitution "does not require that all members of the court on the judiciary have to be present when any action is taken by the Court." The trouble with that argument is that the State Constitution provides that unless all six members are present, including two judges from the Court of Appeals (with substitution for either or both in the event of absence), there is no legally constituted court which has the power to act. The four members present, no matter how good their intentions, had no power themselves to decide at that time, that since only four were present, four should be a quorum, and adopt an unauthorized rule to that effect (Rule 1, adopted on Aug. 15, 1962, quoted on p. 57, Appellee's Brief). And the failure *originally* legally to compose, organize or constitute a court is not cured by the presence *several months later* of all six members, after essential proceedings had already taken place.

At page 58, appellee argues that the rule adopted by the four members who were present, that "four members shall constitute a quorum" was a proper rule, because only the concurrence of four is required to enter an order of removal. Nothing could be more illogical. In the first place, the composition of the court and its quorum, if any, is governed by the provisions of the State Constitution,

wherein it was created, and nothing in that constitution authorizes either action by less than the entire membership of six, or the adoption of a rule for such purpose. In the second place, "quorum" and "concurrence" are kept very much separate and apart in the New York State Constitution. In the Court of Appeals, five Judges constitute a quorum, with only the concurrence of four necessary for a decision, while in the Appellate Divisions of the State, four are a quorum with three required for decision. While it is true that the concurrence of only four members of the Court on the Judiciary is required in order to enter a removal order, the presence of all six is necessary before that Court is empowered to act in the first place. The rule could not change the constitutional requirement.

The only authority set forth in the Constitution to make rules was "concerning the procedure to be adopted for the investigation and trial of a judicial officer * * *." And even if the rule was within the power of the four who were present, nothing therein even attempted to deviate from the constitutional requirement that *two* and not *one* Judge from the Court of Appeals (with provision for substitution in the event of absence) must be present to compose and organize a court and enable it to act.

If four could legally be a quorum under the rule adopted, then only the four Appellate Division Justices could conduct the proceedings from beginning to end without the presence at any time of either Judge from the Court of Appeals; but that is not what the constitution either provides or intended. It is conceded here that Judge Dye, senior associate Judge of the Court of Appeals, was absent from the session of August 15, 1962, and that no substitution was made as the Constitution requires (p. 56, Appellee's Brief).

While jurisdiction may not be waived, even with knowledge that two of the Judges were absent, the record shows that the publicized action of the court of its session of

August 15, 1962 (an ex parte session not attended by appellant or his representative) certified *that all six judges were present.* Three orders were signed on that day which so indicated. (See 3 orders dated Aug. 15, 1962 attached as exhibits to R., motion to vacate).

In addition, the Court later issued a release (see release attached to R., same motion to vacate), stating that the determination on August 15, 1962 was made by "the six-judge body." The only place where the absence of the two Judges from the August 15th session was noted was in the Clerk's Minutes, which were never made available to appellant until after the order of removal had been entered.

Perhaps, as appellee states (p. 58, Appellee's Brief), "it was no secret that Judge Dye was at the American Bar Association meeting in San Francisco and Justice Rabin was in Europe." But appellant certainly had no reason to keep track of each and every one of the hundreds of judges and justices in New York State and to know where each one was at a given time. Appellant's first knowledge that two judges were absent was after the order of removal was handed down and the clerk's minutes were made available to him.

On page 59 of appellee's brief it is stated it is a matter of state law whether the Court on the Judiciary was duly composed and constituted, citing *Kovacs* v. *Cooper*, 336 U. S. 77, 84-85; *Lovell* v. *Griffin*, 303 U. S. 444; and *Winters* v. *New York*, 333 U. S. 507, 514. None of these cases so hold. *Kovacs* v. *Cooper, supra*, involved the question of whether an ordinance of the State of New Jersey barring the use of sound trucks violated due process requirements because it was vague, indefinite and without standards, and has absolutely no relation to the question of composition of a court. *Lovell* v. *Griffin, supra*, similarly involved a question of a vague and indefinite ordinance of a city in the State of Georgia, and the Court there held that the

ordinance was void on its face. The third case cited, *Winters* v. *New York*, also involved the question of a New York City ordinance which made it a misdemeanor to have in one's possession with intent to sell certain obscene literature, and the Court there held, in reversing a conviction under that ordinance, that it was vague and indefinite. None of these cases had anything to do with the point made by appellee at page 59, previously referred to.

POINT V

Appellant was tried on two charges which were never served on either him or the State officials entitled to notice thereunder.

Under its Point VI (p. 60, Appellee's Brief), it is disputed that appellant was tried on two additional charges which were not part of the Statement of Charges served on him. The third charge in the Statement of charges reads that appellant abused his public office as a Justice of the Supreme Court "(3) by violating and failing to observe the concept, spirit and letter of the canons of judicial ethics, and by causing M. Malcolm Friedman to violate and to fail to observe the canons of professional ethics." *There are no "two specifications" of practicing law and income tax violation thereunder as is claimed by appellee* (Appellee's brief p. 33). Even at this late date it is not clear what the charge involved, in view of the failure of the court below to render an opinion, or to find more on this charge than that appellant "by his actions as to the Shevack claim violated and failed to observe the concept, spirit and letter of the canons of judicial ethics". (Appendix A, jurisdictional statement, p. 34) Which "actions as to the Shevack claim" violated which of the 36 canons of judicial ethics remains a mystery to this day. Nor is there any showing how any of the findings con-

stituted an "abuse" of appellant's office of Justice of the Supreme Court.

Neither appellant nor the State officials entitled to notice of the "nature of the charges" could possibly know by reading this third charge that it included a charge of practicing law in the *Shevack* matter and another charge of income tax violation. It was only at a *later* time, after the answer had been served, upon insistence by appellee that evidence with respect to two such charges be included as part of the stipulated record, that appellant's counsel on December 10, 1962 sought a ruling from the Court on the Judiciary as to whether such evidence was admissible in the absence of a charge with respect thereto. Over appellant's objection, the Court ruled that it would receive the evidence, and appellant then, reasserting the objection made, *stipulated that if the witnesses were called they would testify as set forth in the record.* Appellant did not stipulate the evidence with respect to the *Shevack* case and the income tax charge, as part of the record.

The stipulation, so far as pertinent, reads (R. vol. I, p. 7a):

1. That if the witnesses whose names appear in this record were personally called to testify in this proceeding, they would each testify as set forth herein.

2. That this stipulation is entered into by the respondent without in any way waiving respondent's objections heretofore made and herein reasserted to:

> (a) The introduction of any evidence with respect to any and all matters involving the settlement of a claim for injuries sustained by one Arthur Shevack or anything relating thereto;
>
> (b) The inclusion of any matters involving the alleged failure to comply with the Income Tax Laws:
>
> (c) The procedures herein on the grounds asserted by respondent that such procedures are viola-

tive of the mandates, prohibitions and protection of the due process clause of the Fourteenth Amendment to the United States Constitution, raised in paragraph "Sixth" of respondent's answer.

If appellee intended to make additional charges against appellant, the proper thing to do, in accordance with due process, was to amend the statement of charges, serve the amended charges on both appellant and the State Officials entitled thereto, and have issue joined in the regular way, instead of just submitting evidence with respect thereto. They cannot shrug off their responsibility to charge that which they attempt to prove, by a contention that appellant's counsel was orally told that this kind of evidence was going to be submitted, in the face of the failure to make any charges with respect thereto. That is not due process. Appellant and the State Officials were entitled to be told *in advance*, what the charges were.

In any event, assuming even the fact that appellant was aware of these charges, there is no dispute that giving notice to the State Officials that appellant was being charged with a violation of the Canons of Judicial Ethics and causing his brother to violate the Canons of Professional Ethics, did not give *them* the mandated notice that included therein was a charge of income tax violation and a further charge of practicing law. Notice to them of "the nature of the charges", meaning *all* the charges, was an absolute 'condition precedent' under the State constitution to the commencement of the trial.

No finding was ever made as to the income tax charge, or that appellant caused his brother to violate the canons of ethics.

Due Process was violated through failure to give notice of *all* of the charges to be tried.

CONCLUSION

Thus far, appellee has challenged every attempt which has been made to review either the merits of the proceeding before the Court on the Judiciary, or even the questions raised as to the jurisdiction of that Court to proceed in the first instance. In the first decision on such a challenge (Appendix D, Jurisdictional Statement), the Appellate Division held that by reason of the hierarchical scheme of courts in New York State, and for other reasons set forth in the opinion, it had no jurisdiction to consider the questions raised. In response to appellant's motion for leave to appeal to the Court of Appeals from the dismissal by the Appellate Division, appellee has similarly challenged that Court's jurisdiction to grant relief, and has refused to discuss either the merits of the controversy or the jurisdictional questions which have been raised. In the Article 78 proceeding in the Supreme Court of New York County, (brought under New York State Civil Practice Act) where a mandamus was sought against the Comptroller of the City of New York for the payment of salary, thus collaterally attacking the order made by the Court on the Judiciary on the ground of lack of jurisdiction, appellee has similarly taken the position that no New York State court can in any way interfere with the order entered. Appellee has contended in every New York State court that appellant's sole remedy is by way of *this appeal to this Court. Here, however,* appellee argues that even *this* Court should not consider any of the questions raised and that despite the obvious departures from due process detailed in appellant's Jurisdictional Statement, no other court, either state or federal, may question what the Court on the Judiciary has done, or even whether it had jurisdiction to proceed.

We have long since departed from the principle that "The King can do no wrong." The rule of might must not be allowed to supplant the rule of right. Certainly somewhere, some place, in some court and through some

procedure, appellant is entitled to an adjudication of whether he was tried by a duly constituted court, under accepted principles of due process, and in the mode and manner required by the Constitution. Appellant's entire future and livelihood is at stake, and his property as well as a good reputation earned by him through hard work and diligent effort over the past quarter of a century in public life as an Assemblyman, a Senator of the State of New York, a Justice of the Supreme Court elected by more than a million voters, a member of the Board of Trustees of the Brooklyn Law School, a member of the Tweed Commission for the Reorganization of the New York State Courts headed by the eminent Harrison C. Tweed, and other such public offices, should not be taken from him on such flimsy charges, not involving corruption, misfeasance, malfeasance, or even connection with his judicial duties, by a divided bare majority vote, and without at least an opportunity for review by some other body.

"* * * it would be shortsighted not to recognize that times like these are bound to produce temptations and pressures to depart from or temporize with traditional constitutional precepts or even to short cut the processes of change which the constitution, establishes. It is the special responsibilty of lawyers, whether on or off the bench, to see to it that such things do not happen." (From address delivered by Mr. Justice John M. Harlan at dedication of additions to American Bar Center, American Bar Association Meeting at Chicago, August 1963; Editorial Page, New York Law Journal, Aug. 27, 1963).

"A remedy there must be." (Judge Fuld, in *Peo. ex rel. Harrison* v. *Jackson*, 298 N. Y. 219, 227.

This court said in *Mapp* v. *Ohio*, 367 U. S. 643, 659. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

The motion to dismiss or to affirm should be denied, and this appeal should be heard and decided on its merits.

Respectfully submitted,

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